

# National Conference on Limitations and Exceptions to Copyright Law

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# **Fair Dealing With Copyright Works**

Section 52 (1) (a) (b) (f) (m) (n)

Copyright Act 1957

Nikhil Krishnamurthy

Senior Partner

KLAW/ Krishnamurthy & Co.

# Digital Technologies/ Uses

- TataSKY with DVR and Serial Link function
- CD/ DVD Writer
- DVD Decrypter
- Mp3 Ripper/ iTunes
- Bittorrent for Broadcast Programmes
- YouTube/ Blog – Music Performance
- Copinger/ Amazon example
- OCR

# Section 52 (1) (a)

- *Certain acts not to be infringement of copyright. - (1) The following acts shall not constitute an infringement of copyright, namely:*
- *(a) a fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of-*
- *(i) private use, including research;*
- *(ii) criticism or review, whether of that work or of any other work*

# Copyright Act 1911 – Section 2 (1) (i)

- “Any fair dealing” with “any work” for the purposes of private study, research, criticism, review, or newspaper summary
- Present in our since 1912 – pre Article 9 (2)

# De Minimis Non Curat Lex

## ➤ Section 14

- “copyright means the exclusive right ... to do ...the ... acts in respect of a work or any “substantial part” thereof”
- Therefore, if act not with respect to substantial part, no need to analyse if use amounts to fair dealing.

# What is Fair Dealing

- Origins in “fair abridgement” (Guide Book cases)
- Not defined – Case by case basis
- US Copyright law – similar but broader concept of “fair use”

# ***Test in Hubbard v. Vosper***

## ***(1971) 1 All E.R. 1023***

- ✦ *"It is impossible to define what is 'fair dealing.' It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions.... Other considerations may come to mind also. (A)fter all is said and done, it must be a matter of impression...."*



# Elements in Section 107 US Copyright Act

- “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- “(2) the nature of the copyrighted work;
- “(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- “(4) the effect of the use upon the potential market for or value of the copyrighted work.

# Elements in Hubbard

- 1. Extent of quotations (amount and substantiality)
- 2. Consider the use made (purpose and character)
- **3. Rival purpose (effect of the use – Civic Chandran, Oxford v Narendera)**
- 4. Proportion of extract to comment (an offshoot of 1 and 3)
- 5. Other considerations also (Nature of work ?)
- 6. Overall impression

# Fair Use v Fair Dealing

## ➤ Fair Use – Open Ended

- Fair use, “including” such use by...is not infringement.
- For purposes “such as” criticism, comment, news reporting...or research
- In determining...fair use...factors shall “include”

## ➤ Applies to all Works

## ➤ Could be any Exclusive Act

# Fair Use v Fair Dealing

- ✦ Fair Dealing
- ✦ Restricted to certain Purposes
  - Private use (can whole work be copied ?)
  - Research (can whole work be copied ?)
  - Criticism (Quotation - Transformative )
  - Review (Quotation - Transformative – Chancellor Oxford v Narendera)
  - Reporting current events (Informative)
- ✦ Restricted to certain Works
  - Literary
  - Dramatic
  - Musical
  - Artistic
- ✦ But could be in relation to any Exclusive Act (but See S. 14)

# Article 9 (2) of Berne

- Along with the recognition of the reproduction right
- allowed Member Countries to permit the “reproduction of works”
  - 1. In certain special cases
  - 2. Provided such reproduction does not conflict with a normal exploitation of the work, and
  - 3. Does not unreasonably prejudice the legitimate interests of the author

# Article 13 of the TRIPS Agreement

- Also adopts this “three-step” test and provides that Members shall confine limitations or exceptions to “exclusive rights”
  - 1. To certain special cases
  - 2. Which do not conflict with a normal exploitation of the work and
  - 3. Do not unreasonably prejudice the legitimate interests of the right holder

# Panel Decision – Art 13 TRIPS

- Certain “Special Cases”
- Certain
  - Scope of exception should be known
- Special
  - Exception narrow in quantitative and qualitative sense – opposite of “normal case”

# Panel Decision

- Does Not Conflict with “Normal Exploitation”
- Normal
  - Regular, usual, typical, conventional, but less than full use (is, may)
- Exploitation
  - Making use of to extract economic value
- If the allowed use enters into economic competition then conflict
- Google v Perfect 10



# Panel Decision

- Does not Unreasonably Prejudice Legitimate Interests of Right Holder
- Legitimate
  - Justifiable, sanctioned
- Prejudice
  - Harm, injury
- Unreasonable Prejudice
  - If L or E causes unreasonable loss of income

# Art 13 TRIPS and Berne

## ➤ Article 20 (Berne)

### Special Agreements Among Countries of the Union

- The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, **“or contain other provisions not contrary to this Convention”**. The provisions of existing agreements which satisfy these conditions shall remain applicable.

# Article 13

- Does Article 13 of TRIPS cover all the exclusive rights under Berne, or only the right of reproduction ?
- Does it clarify Berne and therefore not contrary ?
- Does it cover even specific L & Es under Berne ?

# Special Cases

- Private Use (earlier Private Study) – No mention in Berne – Protect Works and regulate re-use in a public sphere ? Did Berne contemplate or seek to regulate private uses ? Is the Three-Step Test even required ? Sherlock Holmes example. Import/ download infringing copy for private non-commercial use – due to non-availability ?
- Research – No mention in Berne – whether covers both private or commercial research
- Criticism, Review, Reporting Current Events (already covered under Berne Arts. 10 (1) and 10*bis* (2))

# Special Cases

## ➤ Non-publication

- Works out of circulation
- Works not published
- Delayed-publication

Policy consideration – Access to Works and  
Speed of Availability

# Special Cases

- Back-up against loss/ damage (S. 52 (1) (aa) (ii))
- Replace lost/ damaged work
- Space Shift (CD to CD-R) (S. 52 (1) (ad))
- Time Shift (recording of a broadcast) (S. 39 (a) and Proviso to S. 39-A)) [UK allows this]
- Format Shift (OCR of a book/ DVD to DivX, CD to mp3) [Gowers Review]

# Special Cases

- Software - Termination of Support
  - Private use – uncompensated
  - Commercial use – non-voluntary license
- For determining suitability of application

# Recommendations

- Section 52 (1) (a) – Berne Arts. 9, 10, TRIPS Art. 13
  - All Works
  - Fair Dealing clarified to include back-up, replacement, space/ time/ format-shift
  - Reproduction of Works that are not published/ delayed in publication/ out of circulation for private use and research
  - Include Use of Unsupported Software (uncompensated for Pvt. Use)
  - Satire, Parody, Pastiche (/)



# Recommendations

- Section 51 (1) (b) – Berne Art. 10*bis* (2) – Reporting Current Events
  - All Works
  - Change broadcast to CTP
  - Where applicable, reuse of Work may be of a lesser resolution (eg. Photo, film)
  - Inclusion of amateur media

# Recommendations

- Section 52 (1) (f) – Berne Art. 10 (1)  
(Reading or recitation)
  - Extend permitted act to CTP of the reading  
(Aus)
  - Extend to musical works (SA) {YouTube}

# Recommendations

- Section 52 (1) (m) – Berne Art. 10*bis* (1) –  
Reproduction of articles
  - All subjects (?) – violate Berne ?
  - Include CTP due to digital environment
  - Allow owner of copyright to reserve right of  
reproduction/ CTP

# Recommendations

- Section 52 (1) (n) – Berne Art 2*bis* (2) –  
Report of a Lecture
  - Include in Proviso to Section 52 (1) – identify author and work
  - Include amateur media/ similar sources

# Conclusion

- Whether clarificatory/ new “fair dealing” provisions for “private use” require to satisfy the triple test at all ?
- Assuming, for abundant caution, that they do, endeavoured to set out special cases
- Survey of copyright laws
- Introduce “homestyle” exemption

# Questions?



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# Thank You.



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